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No. ~~77881-7~~

SUPREME COURT OF THE STATE OF WASHINGTON

CHADWICK FARMS OWNERS ASSOCIATION, a Washington  
nonprofit corporation

*Plaintiff/Appellant,*

v.

FHC LLC, a Washington limited liability company;

*Defendant/Third Party Plaintiff/Respondent/Cross-Appellant,*

v.

AMERICA 1ST ROOFING & BUILDERS, INC., a Washington  
corporation; CASCADE UTILITIES, INC., a Washington corporation;  
MILBRANDT ARCHITECTS, INC., P.S., a Washington corporation;  
PIERONI ENTERPRISE, INC., d/b/a PIERONI'S LANDSCAPE  
CONSTRUCTION, a Washington corporation, TIGHT IS RIGHT  
CONSTRUCTION, a WASHINGTON corporation; GUTTER KING,  
INC., a Washington corporation,

*Third Party Defendants/Cross-Respondents.*

**CROSS-RESPONDENT CASCADE UTILITIES, INC.'S  
RESPONSE TO FHC LLC'S PETITION FOR REVIEW**

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## **I. INTRODUCTION**

Cross-Respondent Cascade Utilities, Inc. respectfully requests this Court deny Petitioner FHC LLC's Motion for Discretionary Review because the Court of Appeals, Division I, properly decided the matter at issue. In the alternative, Cascade Utilities, Inc. respectfully requests that the petition for review be limited to the controversy between the HOA and FHC LLC. Specifically, Cascade Utilities contends that in *Chadwick Farms Owners Assn. v. FHC, LLC*, 160, P.3d 1061, the Appellate Court properly held that a dissolved LLC cannot prosecute claims against a party after the date of the LLC's cancellation.

Though Cascade Utilities argues herein and establishes that a cancelled LLC may not prosecute claims, Cascade Utilities takes no position as to whether an LLC may defend against claims that were filed prior to cancellation. Nor does Cascade Utilities take a position on whether the 2006 amendment to RCW 25.15.303 applies retroactively to allow a party to bring a claim against a cancelled and dissolved LLC. Cascade Utilities notes only that even when applied retroactively, RCW 25.15.303 allows a cancelled and dissolved LLC to defend against claims, but it does not allow the LLC to prosecute claims. As such, the petition for review should be denied in so far as it attempts to address the ruling on FHC LLC's third-party claims.

## II. ISSUE STATEMENT

1. Should the Supreme Court deny review where the Court of Appeals properly held that a cancelled and dissolved LLC loses its right to prosecute claims against third-parties and where statute does not provide for an LLC's right to prosecute claims after cancellation?

**Answer:** Yes.

## III. STATEMENT OF THE CASE

At issue in this matter is a limited liability company ("LLC") that failed to file its annual report and pay its license renewal fees and, as result – under statutory mandate and after written notice – the Secretary of State dissolved the LLC and then cancelled the LLC's formation. When cancellation occurred, the LLC ceased to exist and lost any right or ability to act.

### A. Substantive Facts Relevant to This Motion.

This case arises out of the construction of the Chadwick Farms Condominium Project ("Project"), upon which FHC LLC ("FHC") acted as the developer and general contractor. After completion of the Project, FHC ceased operations and failed to renew its license as a LLC as required under RCW 25.15.290. Clerk's Papers ("CP") 76. Accordingly,

on March 23, 2003, the Washington Secretary of State issued a Certificate of Administrative Dissolution for FHC. CP 13.

On August 18, 2004, after the Secretary of State filed the Certificate of Dissolution, but before FHC was cancelled, the Chadwick Farms Homeowner Association ("HOA") filed a lawsuit against FHC alleging construction defects at the Project. CP 15-19.

By March 23, 2005, two years had passed since the Secretary of State cancelled FHC, thus completing the two year winding up period specified in RCW 25.15.290(4). At that time, FHC ceased to exist as a legal entity and it could no longer prosecute claims against third parties.

On May 11, 2005, nearly nine months after the HOA filed suit and almost two months after it had been cancelled, FHC filed a Third-Party Complaint against Cascade Utilities and other Third-Party Defendants. CP 132-192.

**B. Procedural History.**

FHC brought a Motion for Summary Judgment against the HOA arguing that the HOA was precluded from pursuing the lawsuit based on FHC's dissolved and cancelled status. CP 1-19. On September 30, 2005, the trial court granted FHC's motion. CP 98-101. The trial court also granted separate orders dismissing FHC's claims against Cascade Utilities and the other Third-Party Defendants based on their summary judgment

motions, which motions argued that as a cancelled LLL, FHC could not prosecute its claims. CP 105-107, 98-101, 108-112. Id.

The HOA appealed the trial court's dismissal, arguing among other things that (1) the trial court erred when it dismissed claims against the LLC where the claims were brought by the Plaintiff HOA prior to the end of the two year dissolution period; (2) the newly enacted RCW 25.15.303 allows a LLC in wind-up to defend claims; (3) RCW 25.15.303 is retroactive; and (4) the trial court erred when it refused to allow the HOA to amend its Complaint to add claims against the LLC principals in their individual capacity.

FHC filed a cross-appeal against the Third-Party Defendants based upon the trial court's dismissal of FHC's claims against the Third-Party Defendants. Cascade Utilities opposed the appeal, arguing that regardless of the Appellate Court's determination of the validity of the HOA's claims, a cancelled LLC could not prosecute claims. Had FHC wished to maintain its rights to prosecute claims, all it needed to do was renew its license, which it failed to do.

The Court of Appeals affirmed in part and reversed in part. Specifically, it held that RCW 25.15.303 applied retroactively to allow the HOA to commence action against the cancelled FHC, but the statute did not allow FHC to prosecute claims for its own benefit *Chadwick Farms*

*Owners Assn. v. FHC, LLC*, 160, P.3d 1061. The Court reasoned that RCW 25.15.303 specifically contemplated that a Plaintiff could prosecute claims against the cancelled LLC, but it did not allow for the LLC to prosecute claims. *Id.* Upon the facts of this case, the Court reasoned that FHC had ample opportunity to maintain its ability to prosecute claims by simply re-filing its license with the Secretary of State. Where it failed to do so, it forfeited its ability to prosecute claims.

Further, the Court held that the trial court erred in refusing to allow the HOA to amend its Complaint to include the individual members of FHC.

FHC has appealed the Court of Appeals decision.

#### **IV. ARGUMENT AND AUTHORITY**

##### **A. Review is not Warranted in This Matter.**

This Court will only grant review of an Appellate Court decision

when:

(1) If the decision of the Court of Appeals is in conflict with a decision of the Supreme Court; or (2) If the decision of the Court of Appeals is in conflict with another decision of the Court of Appeals; or (3) If a significant question of law under the Constitution of the State of Washington or of the United States is involved; or (4) If the petition involves an issue of substantial public interest that should be determined by the Supreme Court.

RAP 13.4(b).



FHC does not address the first three prongs of review and instead bases its petition on whether or not a public interest is implicated by the Court of Appeals' decision. Such an interest however is not implicated here. The Appellate Court conducted a standard statutory review of Chapter 25.15 RCW and concluded that the statute did not allow for a cancelled LLC to prosecute claims against Third-Parties. This holding was based solely on the statutory framework created by Legislature and did not create or clarify that framework. In fact, the Court of Appeals simply restated the existing law and properly applied it to FHC. In other words, contrary to FHC's brief argument, the public interest is not served by this Court further reiterating this already established law.

Further, the Appellate Court's holding was proper and the Court conducted no error in its Opinion. Accordingly, this Court need not review that decision.

**B. The Court of Appeals Properly Held That FHC Could not Prosecute its Claims Against the Third-Party Defendants.**

**1. *FHC Ceased to Exist Upon its Cancellation.***

RCW 25.15.285 requires a LLC to pay its license fees and file an annual report. If it fails to do so, the Secretary of State may administratively dissolve that LLC after providing notice of the pending dissolution. RCW 25.15.285. Under RCW 25.15.290, a dissolved LLC

has two years from the date of administrative dissolution within which to apply for reinstatement. But “a limited liability company is dissolved and its affairs shall be wound up upon...the expiration of two years after the effective date of [administrative] dissolution.” RCW 25.15.270.

The cancellation of the certificate of formation marks the end of the winding up period and the end of the limited liability company’s existence and ability to act. RCW 25.15.070(2); RCW 25.15.270(6).

Here, FHC was administratively dissolved on March 24, 2003. On that date, FHC’s winding up period began and under RCW 25.15.270, the winding up period concluded two years from the date of administrative dissolution. With the use of the term “shall,” the legislature rendered the time limitation mandatory, thereby indicating that FHC could not continue winding up more than two years after the date of administrative dissolution. RCW 25.15.270.

In short, as of March 24, 2005, FHC ceased to be a legal entity and no longer had the right or ability to prosecute claims. As such, its May 11, 2005 Third-Party Compliant was not valid and the Appellate Court properly ruled that FHC could not maintain its claims against Cascade Utilities.

2. *A Cancelled LLC Cannot Prosecute Claims.*

RCW 25.15.295 states that a cancelled LLC may not prosecute claims. It is undisputed that the Secretary of State cancelled FHC's certificate of formation on March 24, 2005. Accordingly, on March 24, 2005, FHC lost its right to "prosecute" any and all claims against anyone, including Cascade Utilities. RCW 25.15.295(2).

As the Appellate Court noted, FHC easily could have preserved its right to prosecute claims – and could have avoided the cancellation of its certificate of formation – by applying for reinstatement pursuant to RCW 25.15.290. *Chadwick Farms Owners Assn. v. FHC, LLC*, 160, P.3d 1061. But it did not. FHC now argues that prior to cancellation it was in the process of "vigorously defending" against the HOA's claims and investigating claims against the subcontractors. Br. of Appellant at 21. This, however, does not explain how or why FHC could not preserve its right to prosecute claims by filing for reinstatement. In fact, FHC points to no statutory authority allowing it to prosecute claims after cancellation. Moreover, FHC provides no justification or explanation as to why it took FHC more than nine months to file a third-party complaint.

In short, under the pre-2006 Amendment statute FHC's right to prosecute claims expired along with the winding up period on March 24, 2005.

3. *The 2006 Amendment to Chapter 25.15 RCW Further Prohibits FHC From Prosecuting Claims.*

As stated above, Cascade Utilities does not take a position on the retroactivity of RCW 25.15.303 except to note that this provision does not provide for a dissolved and cancelled LLC to prosecute claims. Thus, even if this Court were to look to the 2006 Amendment for guidance as to the determination of the viability of FHC's third-party complaint, it would find no support in the 2006 Amendment to reinstate FHC's claims against the third-party defendants—including Cascade Utilities.

RCW 25.15.303 states:

The dissolution of a limited liability company does not take away or impair any remedy available against that limited liability company, its managers, or its members for any right or claim existing, or any liability incurred at any time, whether prior to or after dissolution, unless an action or other proceeding thereon is not commenced within three years after the effective date of dissolution. Such an action or proceeding against the limited liability company may be **defended** by the limited liability company in its own name.

(Emphasis Added).

The Statute specifically contemplates actions filed against a cancelled and dissolved LLC. It does not, however, create any exception to the existing dissolution statute or otherwise allow for the cancelled LLC to prosecute claims against third-parties. This is evidenced by the language in the legislation itself, which addresses remedies available

against an LLC, and sets forth a three year time period in which an action must be commenced against that LLC.

Further, as discussed by the Court of Appeals, this Amendment sought to preserve the right for remedy against a cancelled and dissolved LLC. *Chadwick Farms Owners Assn. v. FHC, LLC*, 160, P.3d 1061; *See also*, H.B. Rep. on S.B. 6531, at 2, 59<sup>th</sup> Leg., Reg. Sess. (Wash. 2006). The Legislative history and statutory language are silent as to an LLC's ability to prosecute claims. Therefore, all rights to prosecute claims would remain as outlined in Chapter 25.15 RCW.

C. **Cascade's Right to a Dismissal Based on FHC's Cancellation is Independent, and Distinguishable, From the Issues Involving the HOA.**

As stated above, Cascade Utilities does not take a position on the validity of the HOA's claims against FHC. Assuming that the HOA's claims against FHC are allowed to proceed, such a result should have no impact on barring FHC's claims against Cascade. Despite FHC's assertions to the contrary, the factual and legal distinctions based on the timing of the claims and FHC's cancellation – as well as the impact of same under Chapter 25.15 RCW – creates a factual and legal basis for this Court to issue different rulings as to the HOA's claims against FHC and FHC's claims against Cascade, *et al.* As outlined above, the law bars a cancelled LLC from prosecuting claims. It cannot be argued that this is an

unfair or harsh result, as the power to retain the privilege of prosecuting claims lay solely with FHC itself. FHC easily could have preserved its right to prosecute claims – and could have avoided the cancellation of its certificate of formation – by applying for reinstatement pursuant to RCW 25.15.290. It did not do so. If FHC truly believed that its cancellation insulated it from the HOA's claims, then it would not have filed its third-party complaint.

Any harsh result that may exist by dismissing or upholding the HOA's claims has no bearing on FHC's claims against Cascade Utilities. Though the HOA may have done everything it could do to preserve its claims, FHC did nothing to preserve its claims against Cascade Utilities, *et al.* FHC needed only to submit an application for reinstatement to the Secretary of State within two years of administrative dissolution. FHC, therefore, always controlled its own destiny in this matter. In fact, the HOA sued FHC prior to the expiration of the two year reinstatement period. Clearly, FHC made the choice to allow its formation to be cancelled and waive its LLC privileges and the power to prosecute claims.

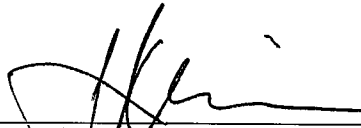
## **V. CONCLUSION**

Based on the foregoing, Cascade Utilities respectfully requests this Court deny FHC's petition for review or in the alternative limit the review to the controversy between the HOA and FHC. The Appellate Court's

holding in this matter was proper based on clear statutory provisions prohibiting a cancelled and dissolved LLC from prosecuting claims against third-parties.

RESPECTFULLY SUBMITTED this 15<sup>th</sup> day of August, 2007.

SCHEER & ZEHNDER LLP

A handwritten signature in black ink, appearing to read 'J. Holt', is written over a horizontal line.

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Attorneys for Cascade Utilities

**CERTIFICATE OF SERVICE**

I, LAUREN TURNER, certify that on the 15<sup>th</sup> day of August, 2007, I caused a true and correct copy of this **CROSS-RESPONDENT CASCADE UTILITIES, INC.'S RESPONSE TO FHC LLC'S PETITION FOR REVIEW** to be served on the following in the manner indicated below:

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DATED this 15<sup>th</sup> day of August, 2007.

By: 

Lauren Turner